IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.797 OF 2003.

Mohamed Nisar Riyaz Khan,
Age-29 yrs. R/o Dongari, Saphale,
Tal.-Palghar, Dist.-Thane. ..Appellant/-
Orig.Accused No.2.

V/s.

The State of Maharashtra
through Saphale Police Station
Taluka Palghar,
District-Thane. ..Respondent.

AND

CRIMINAL APPEAL NO.870 OF 2003

Mr.Vijaypal Gulabsingh Chauhan,
Aged about 25 years, Indian Hindu
Inhabitant, Resident of Alinagar, Palani
Post: Basela Khurd, Taluka: Dhampur,
District:Bijnor, State:Uttar Pradesh, ..Appellant.
At present he is in jail. Orig. Accused No.1.

V/s.

The State of Maharashtra
through The Public Prosecutor,
High Court, Criminal Appellate Side,
High Court Annexe, Mumbai 400 020. ..Respondent.

Mr.Tejesh Dande, advocate for appellant/accused No.2.

Mr.J. A.Udaipuri, advocate for appellant/accused No.1.

Mr.V.B.Konde-deshmukh, APP for respondent State.

CORAM: A.M.KHANWILKAR,J

DATE : SEPTEMBER 13, 2006.

ORAL JUDGMENT:

1. These appeals can be disposed of by common Judgment. I intend to do so because both the appeals are filed against the self-same Judgment and order passed by the Second Ad-hoc Additional Sessions Judge, Palghar dated 6th June, 2003 in Sessions Case No. 32 of 2002. The appellants before this court are accused No.2 and Accused No.1 respectively. The appellants were chargesheeted and tried for offence punishable under section 363, 366A and 376 r/w. 34 of I.P.Code alongwith four other accused. The other accused have been acquitted. The accused No.1 has been convicted for offence punishable under section 363, 366A and 376 of I.P.Code, whereas Appellant-accused No.2 has been convicted for offence punishable under section 363 r/w 34 of I.P.Code only.

2. For the arguments that I am called upon to consider and would be sufficient to dispose of both the appeals by this common judgment, it is not necessary to advert to the factual matrix of the case in extenso. Suffice it to observe that the appellants were tried for the aforesaid offences on the allegation that the accused No.1 took Kum. Anjum (P.W.3), when she had gone to attend her school on 12th October, 2001 with the help of accused No.2 from the area within the jurisdiction of Saphale Police Station in Taluka

Palghar, district Thane. From there they took her to Village-Jaitra in State of U.P. It is alleged that the accused No.1 took Kum.Anjum (P.W.3) to different places until 3rd November, 2001. In the interregnum, the accused No.1, with the help of one Rai Bahadur Arya, Ex-surpanch of village Jaitra, got prepared false birth certificate of Kum. Anjum. On the basis of the said certificate accused No.1 and Kum. Anjum performed marriage as per Arya Samaj rituals. After performing such marriage on 22nd November, 2001, accused No.1 committed forcible sexual intercourse on Kum. Anjum on several occasions. The prosecution case is that Kum. Anjum was below 16 years of age on the date of occurrence. In other words, the prosecution case is that the accused No.1 with the help of accused No.2 forcibly took away Kum. Anjum from the custody of lawful guardians and thereafter, accused No.1 committed forcible intercourse on Kum. Anjum on several occasions. Thereby, committed offence, for which the said accused were tried before the lower Court. The accused pleaded not guilty. On analysing the evidence on record, the trial Court found as of fact that Kum. Anjum was below 16 years of age on the relevant date. On that finding, the trial Court proceeded to hold that the fact whether prosecutrix (P.W.3) consented for sexual intercourse or not or resisted the same was irrelevant because, the concerned accused would nevertheless be proceeded for having committed offence under section 376 of I.P.Code, in view of clause sixthly of section 375 of I.P.Code. On that reasoning, the lower Court proceeded to record finding of guilt against the

appellants herein/accused Nos.1 and 2, as noted earlier. The Trial Court has however, not analysed the evidence to examine the issue as to whether the prosecutrix (P.W.3) was taken from the custody of her lawful guardians forcibly or she had gone with accused No.1 on her own accord. In other words, whether it was a case of elopement or forcible removal or taking away of Kum.Anjum by Accused No.1; Without analysing this aspect, the trial Court has proceeded to record finding of guilt against both the accused Nos. 1 and 2 even for offence under section 363 of I.P.Code.

3. Before this Court two points were agitated by the counsel appearing for the appellants/accused Nos.1 and 2. First contention raised on behalf of both the accused is that the finding of fact recorded by the trial Court on the factum of age of prosecutrix (P.W.3) at the relevant time or the date of occurrence, to be below 16 years of age, cannot be sustained.

4. The second contention argued before this Court in particular, at the instance of accused No.2 is that, the accused No.2 has been found guilty of the offence only under section 363 r/w 34 of I.P.Code. Counsel appearing for the accused have criticised the approach of the trial Court in recording the said finding of guilt under section 363 of I.P.Code against accused No.1 or for that matter even against accused No.2. These are only two questions agitated before me at the hearing of these appeals.

5. Having considered the rival submissions and going through the relevant record with the assistance of the counsel appearing for the parties, I have no hesitation in upholding the finding of fact reached by the trial Court on the fact that the prosecutrix (P.W.3) was below 16 years of age at the relevant time or on the date of occurrence. There is clinching material to affirm that view taken by the trial Court. The prosecution has examined, amongst others, P.W.1, P.W.3, P.W.4 and P.W.6, who have spoken about the age of the prosecutrix on the date of occurrence. Besides, the prosecution has relied on the bonafide Certificate (Exh.50) issued by the school in which prosecutrix (P.W.3) was studying in standard 7 at the relevant time. From the said certificate, it is seen that the date of birth of Kum. Anjum is noted as 15th July, 1989. Taking that date into account and if that evidence is accepted, as is done by the trial Court, with which view I am in agreement, it necessarily follows that prosecutrix(P.W.3) was below 16 years of age at the relevant time or on the date of occurrence. The bonafide Certificate(Exh.50) has been proved by P.W.6, who was the Head-Master of the concerned school. He has not only proved the said certificate, but also brought the original admission register maintained by the school in ordinary course of business of school. The fact that Kum.Anjum had taken admission in the school has been established from the entry in the said register at Sr.No.11117 dated 13th June, 2001. P.W.6 has stated that the bonafide certificate refers to the date of birth,

which has been noted on the basis of the school leaving certificate given by the school from Kanpur, Vidya Basic Shikhsha School, U.P. Although this witness has been cross-examined, the relevant version given by P.W.6 has gone unchallenged. In the cross-examination, suggestion was given to this witness at the instance of accused Nos. 1,4,5 and 6, which has been denied by him in the following words:

> "It is not correct to say that birth date of Anjum as per leaving certificate was dated 15-07.09. It is not correct to say that I deposed false that Birth date of Anjum was 15-07-1989."

This question does not take the matter any where for the accused. In the cross-examination, at the instance of accused Nos.2 and 3 also, nothing has been culled out so as to doubt the credentials or for that matter veracity of version given by this witness. The relevant suggestion, which was given to this witness has been answered by P.W.6 as follows:

> "It is correct to say that that entry in respect of Anjum was taken from her previous leaving certificate."

This question in fact supports the prosecution case that the bonafide Certificate(Exh.50) issued by P.W.6 is genuine document, based on cogent material produced before the school at the relevant time.

6. Besides, there is evidence of P.W.1 father Usmanali Nababalli Sayyed. He has deposed that age of the prosecutrix at the relevant time was around 13 years. This witness has been cross-examined. However, nothing has been brought in the said cross-examination. What is relevant to note is that even in the complaint filed by P.W.4, she had clearly stated that the age of prosecutrix at the relevant time was about 12 years 4 months, which age given in the complaint is corroborated by the evidence of P.W.6 and bonafide Certificate issued Exh.50. Besides, P.W.4 in her evidence has clearly stated the age of prosecutrix at the relevant time was 14 years. There is absolutely no cross-examination of P.W.4 on this aspect at all. The fact so stated by the P.W.4-mother, who is the natural witness to depose about the age of prosecutrix has not been challenged by the defense at all. The prosecutrix (P.W.3) while deposing before the Court has also given her age as 13 years, which age has not been challenged in the cross-examination. The trial Court has adverted to all these aspects to rightly conclude in paragraph-24 of the Judgment under challenge that the prosecution has established its case that the age of girl(prosecutrix) on the relevant date was below 16 years.

7. Even before the lower Court, argument was canvassed that benefit should be given to the accused, as it has come in the medical evidence (Exh.56) that age of the girl was between 15 to 17 years. Besides, Dr. Devyani Dhirubhai Makwana, medical officer of Bhagwati hospital, Borivali examined Kum.Anjum and opined that the age should be between 15

to 17 years. The trial Court has rightly rejected this contention relying on the other prosecution evidence amongst other, Bonafide Certificate Exh.50 and the ocular evidence of P.W.1,4,3 and 6 read together. No fault can be found with the said approach of the trial Court. That view taken by the trial Court is a possible view, rather the only view that can be taken on the basis of evidence, as has come on record in the present case. Accordingly, the first issue will have to be answered against the appellants. Once it is found that, the prosecutrix was below 16 years of age at the relevant time or on the date of occurrence, it necessarily follows, by operation of law, irrespective of the fact that the prosecutrix consented for sexual intercourse, the person responsible for committing sexual intercourse will be liable to be held guilty for offence under section 376 of I.P.Code. The fact of consent will make no difference to that situation, just as is in the present case. In the present case, the fact recorded by the lower Court that the prosecution has established that prosecutrix (P.W.3) was subjected to sexual intercourse by the Accused No.1 has not been challenged before this court. It necessarily follows that Accused No.1 is guilty of offence under section 376 of I.P.Code. Thus understood, the order passed by the trial Court against the accused No.1 for having convicted him for offence under section 376 of I.P.Code cannot be interfered with.

8. That takes me to the second contention raised before me that the Court below has found the appellants/accused Nos. 1 and 2 guilty of the offence punishable under section 363 of I.P.Code. The question is whether

that finding can be sustained. According to the appellants, there is no legal evidence to support the prosecution case that Kum.Anjum was forcibly taken away from the custody of her natural guardians. On the other hand, the evidence would support the stand of the appellants/accused that Kum.Anjum had accompanied the accused No.1 on her own accord. It was neither a case of taking away or enticing Kum.Anjum, to be removed from the custody of her natural guardians. There is substance in the grievance made on behalf of the appellants that the Court below has proceeded on the assumption that since age of prosecutrix (P.W.3) was below 16 years, whether she had consented or willingly joined the company of the accused No.1 would make no difference. That approach is manifestly wrong. The Apex Court in the case of **S. Varadrajan V.s. State of Madras reported in AIR 1965 SC 942** has had occasion to consider this aspect in paragraph-9 of the said decision. The Apex Court has observed that it must be borne in mind that there is marked distinction between “taking” and “allowing” a minor to accompany a person. The Apex Court proceeded to hold that the two expressions are not synonymous. It is further noted that it was not laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. The Apex Court has further observed that it would limit itself to a case like the one before it where the minor alleged to have been taken by the accused person left her father' s protection knowing and having capacity to know the full import

of what she was doing and voluntarily joins the accused person. In such a case, the Court observed that, the accused cannot be said to have taken her away from the keeping of her lawful guardian. It has then observed that something more is required to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. This is the test, which will have to be kept in mind while dealing with the charge under section 363 of I.P.Code. Indeed, the prosecutrix (P.W.3) has spoken about the manner in which she was forcibly taken away by the accused No.1 in association with Accused No.2 in that behalf. However, from the evidence of P.W.3 it is noticed that though she was minor, she had capacity to know the full import of what she was doing. There is nothing on record to suggest that Accused No.1 was responsible for formation of the intention of P.W.3 to leave the house of her guardian. From the cross-examination of P.W.3 it is seen that she had on her own accord joined the company of Accused No.1. This position can be culled out from her version amongst others, in paragraph-11,12 and 13, and more particularly in paragraph-17. In paragraph-17 she deposed thus:

> "17. It is correct to say that school boys of that school also goes to school by abovesaid road. It is correct to say that there is no railway crossing on that route. It is correct to say that one had to cross police station to reach at railway gate. My sister Rehana had not seen Vijaypal near railway gate. While going towards school I has having school bag, books, colour in it. It is not true to say that while leaving house and going to school I kept books near the bed of my mother and kept Panjabi

> suit inside of the school bag and started to go to school. Vijaypal met me near railway gate at after 5 to 10 minutes from 6:30 a.m.. It is correct to say that there is one train at 6:30 a.m. Come from Virar and go to Vapi. It is correct to say that the said train had left Safala Railway Station. It is correct to say that we missed that train so caught bus and came at Palghar. It took five minutes by walk to reach S.T. Stand from railway station. It is correct to say that I was following Vijaypal but there was some distance between us. It is correct to say that we met at Bus Stand and then sat in the S.T.Bus. We took lunch at Surat and myself changed my school dress there and wore Panjabi suit. Myself and Vijaypal sat together in S.T.Bus, at Safala. It is correct to say that I was not having any money. It is correct to say that Vijaypal spent amount for S.T.Fair. I do not remember whether Vijaypal had brought railway ticket at palghat Rly. Station. It is not correct to say that myself and Vijaypal standing at different places at Palghar Railway Station platform. I do not know whether there is railway police station and chowki at the platform of Palghar, Rly Station. It is correct to say that Railway police are always on the platform. I did not take help of the police either at Safale or at Palghar. I did not tell any passenger standing at railway platform Palghar that Vijaypal was forcefully taking me away. It is correct to say that I was having friendship with accused Vijay pal. It is correct to say that I used to talk with Vijaypal and had not fear from him. It is not correct to say that Nisar was not present when Vijaypal met met at Safale S.T. Stand. It is not correct to say that Nisarmama was not with us in S.T.Bus left from Safale to Palghar. It is not correct to say that I deposed false that Nisarmama was present at Palghar Railway Station."
>
> (emphasis supplied)

9. I have no manner of doubt that the appellants are right in contending that in such a case the appellants cannot be proceeded for offence under section 363 of I.P.Code. Something more was required to be shown, as is observed by the Apex Court. However, that position is not established from the evidence on record.

10. In so far as involvement of accused No.2 with regard to the offence under section 363, the only material evidence that can be culled from the deposition of P.W.3 is as follows:

> "Nisarmama was with Vijaypal. As per call of Vijaypal I went near him. Vijaypal caught hold my hand. He took me to the S.T.Stand Safala. It is near railway gate. Nisarmama was also accompanied Vijaypal. Nisarmama advised Vijaypal to take me away and he would see the further consequences. Vijaypal and Nisarmama took me to Palghar by S.T.Bus." (emphasis supplied)

11. Having regard to the findings already reached as noted earlier, it is unnecessary to dwell upon the issue as to whether there was sufficient evidence against the accused No.2 about his complicity in the commission of offence. There is no allegation against the accused No.2 with reference to the charge under section 376 of I.P.Code. The only charge proved against him is referable to section 363 r/w 34 of I.P.Code. As I have already opined that there is no legal evidence to proceed against the appellants/accused Nos.1 and 2 for offence under section 363 of I.P.Code, both the appellants would succeed to that extent. In other words, the appeal preferred by accused No.2 will succeed in entirety.

12. Accused No.1 has been found guilty of the offence under section 366A of I.P.Code. In so far as that finding is concerned, it is rightly submitted that the section would come into play, if it was to be established by the prosecution that the minor girl was taken away with intent or knowledge that she was likely to be forced or seduced to illicit intercourse with "another person". In the present case, the charge against the appellant/accused No.1

was that he himself committed forcible sexual intercourse on the minor girl Kum.Anjum. In such a case section 366A will have no application. That section could have been invoked at best against the accused No.2, that is not the offence for which accused No.2 has been found guilty by the lower Court. The State has not challenged that part of the decision of the trial Court. Suffice it to observe that accused No.1 cannot be proceeded for offence under section 366A of I.P.Code.

13. The last question that remains to be answered is the quantum of sentence, in so far as accused No.1 for offence under section 376 of I.P.Code. Indeed, the trial Court has considered this plea of accused No.1 and rejected the same on the reasoning that no mercy can be shown to the accused No.1. However, counsel appearing for the accused No.1 before this Court would contend that the Court should take lenient view in the matter having regard to the fact situation of the present case. According to him, there are circumstances, if reckoned, would persuade the Court to take a lenient view. There are adequate and special reasons, on which basis the appellant/accused No.1 can be shown leniency. It is submitted that from the prosecution case, it is established that the accused No.1 at the relevant time was about 21 years of age. It is submitted that in his tender age at the relevant time, coupled with the fact that intention of the accused No.1 was honest, as is evident from the fact that after he and prosecutrix (P.W.3)

removed themselves to village Jaitra in U.P., accused No.1 contracted marriage with the prosecutrix(P.W.3) and thereafter, both the accused No.1 and prosecutrix stayed together for some time as husband and wife. It is then submitted that the accused No.1 has already undergone substantial part of the sentence. He is in jail for four years and nine months. It is submitted that the accused No.1 has earned remission as well. According to the learned counsel, taking all these factors into account, it is a case where leniency may be shown to the accused No.1 by reducing the sentence imposed by the trial Court for offence under section 376 of I.P.Code to one that is the sentence already undergone by the accused No.1/appellant. This submission however, is opposed by the Public Prosecutor. According to him, age factor cannot be the basis to hold that it would be adequate and special reason to impose sentence of imprisonment for a term less than seven years. The learned Public Prosecutor also submits that the fact that the accused No.1 has already undergone substantial sentence period also cannot be termed as adequate and special reason to show leniency for accused No.1. He further, submits that there is no record before this Court about the behaviour pattern of appellant/accused No.1 while in jail. On this basis, it is submitted on behalf of the State that no indulgence be shown to the appellant/accused No.1 on the quantum of sentence.

14. Having considered the rival submissions on this aspect, I am

inclined to accept the argument of appellant No.1 that quantum of sentence should be reduced to the period of sentence already undergone by the appellant/accused No.1 so far. I am inclined to do so having regard to the peculiar facts of the present case. It is established from the record that the appellant/accused No.1 was in love with prosecutrix (P.W.3). She also responded and it was obviously a reciprocal affair. It is only because of reciprocal relationship between the accused No.1 and prosecutrix (P.W.3), she eloped alongwith accused No.1 and had no reason to register any protest. I have already found on analysing the evidence on record that the prosecutrix (P.W.3) had joined the company of the accused No.1 on her own accord with full understanding of what she was doing. It cannot be overlooked that the accused No.1 was hardly 21 years of age at the relevant time. The offence in question is said to have been committed-as the prosecutrix was below 16 years of age at the relevant time, willingness of the prosecutrix with full understanding notwithstands. It is seen that the accused No.1 and prosecutrix (P.W.3) were mutually agreed for the relationship. To effectuate their plans, the accused No.1 after removing himself and prosecutrix (P.W.3) and on reaching village Jaitra in the State of U.P. got married with prosecutrix (P.W.3). The accused No.1 had physical relations with the prosecutrix only after their marriage. This Court is not concerned with the issue whether the said marriage was or is illegal and void. The fact remains that there are clinching circumstances on record to show that the

accused No.1 and prosecutrix (P.W.3) had willingly entered into the relationship of husband and wife under misconception that they can do so. As mentioned earlier, having regard to the tender age and offence having been committed out of reciprocal passion; coupled with the fact that the accused No.1 has already suffered substantial part of his sentence period, as imposed by the lower Court, having undergone four years and nine months in jail and certainly must have earned some remission, the appropriate course to my mind would be to accept the argument of the appellant/Accused No.1 to reduce the period of sentence to one already undergone by the accused in connection with the present offence. During the course of argument, it was submitted that ordinarily one week' sremission period is earned by the accused in the ratio of four weeks' actual imprisonment undergone. For the length of actual sentence already undergone by the accused No.1, he must have earned substantial remission period of over one year. In other words, by now the accused No.1 must have already completed sentence period of about six years, taking into account remission earned by the accused in relation to the present offence.

10. Hence I pass following order.

ORDER

A. Accordingly, the appeal preferred by Accused No.2 being Criminal Appeal No.797 of 2003 succeeds in entirety.

B. The Impugned Judgment and order recording finding of guilt against the accused No.2 for offence punishable under section 363 r/w 34 of I.P.Code is quashed and set aside. Instead, the accused No.2 is acquitted of the said charge.

C. In so far as Criminal Appeal No. 870 of 2003 filed by the accused No.1 is concerned, the same partly succeeds.

? . The finding of guilt recorded against the accused No.1 by the trial Court for offence punishable under section 376 of I.P.Code is affirmed. However, the finding of guilt regarding offence under section 363 and 366A of I.P.Code against accused No.1, is quashed and set aside. Instead, the accused No.1 is acquitted of the charge pertaining to the offence under section 363 and 366A of I.P.Code.

? . It is ordered that the period of sentence to be undergone by accused No.1 for offence under section 376 of I.P.Code is reduced to period of sentence already undergone.

D. The appellant/accused No.1 be set at liberty forthwith,

unless required in any other offence.

E. Bail bond of accused No.2 to stand cancelled.